

Paul D. Scott, Esq. (SBN 145975)
 pdscott@lopds.com
 Lani Anne Remick, Esq. (SBN 189889)
 laremick@lopds.com
 LAW OFFICES OF PAUL D. SCOTT, P.C.
 435 Pacific Avenue, Suite 200
 San Francisco, California 94133
 Tel: (415) 981-1212
 Fax: (415) 981-1215

Attorneys for Relator Michael Franchek

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES <i>ex rel.</i> MICHAEL) No. 4:16-cv-02789-JSW
FRANCHEK and STATE OF)
CALIFORNIA, <i>et al.</i> <i>ex rel.</i> MICHAEL) DECLARATION OF ERIC R. HAVIAN
FRANCHEK,) IN SUPPORT OF MOTION FOR
) AWARD OF ATTORNEYS' FEES
Plaintiffs,) UNDER THE FEDERAL AND
) CALIFORNIA FALSE CLAIMS ACTS
v.)
) Hearing Date: January 21, 2022
WORKRITE ERGONOMICS, LLC and)
KNAPE & VOGT MANUFACTURING) Time: 9:00 a.m.
COMPANY,)
)
Defendants.)
_____)

I, Eric R. Havian, declare and state:

1. I am a partner in the San Francisco office of Constantine Cannon LLP, admitted to practice in California, multiple United States Courts of Appeals, and several United States District Courts around the country. I make this declaration to state my knowledge and offer my opinion regarding plaintiff's motion for an award of attorneys' fees and costs in this case. It is

1 based upon my own personal knowledge. If called as a witness to this action, I would testify to
2 the facts and opinions stated herein.

3 2. In 1981, I graduated *cum laude* from Harvard Law School, and that year was
4 admitted to the California bar. At law school, I was an oralist for the team that won the Ames
5 Moot Court Competition. After I graduated, I practiced complex civil litigation at the Center for
6 Law in the Public Interest and Heller Ehrman LLP. In 1987, I joined the Criminal Division of the
7 U.S. Attorney's Office in San Francisco, where I became an Assistant United States Attorney,
8 and was the lead prosecutor for defense procurement fraud cases. In 1994, I joined Phillips &
9 Cohen LLP, where I opened the firm's West Coast office and practiced until joining Constantine
10 Cannon LLP in 2015.

11 3. Since leaving the government in 1994, I have focused my practice on representing
12 relators in *qui tam* litigation under the federal and state False Claims Acts and other similar
13 statutes. In 2007, I was lead counsel for a whistleblower and several schools and other public
14 agencies, in a trial that resulted in a \$225 million verdict against an electric utility for
15 overcharging its government customers. I represented a whistleblower and dozens of public
16 agencies as lead counsel in a 13-year litigation that resulted in the 2009 payment of \$90 million
17 by companies selling high-lead waterworks parts to California municipalities. I also was lead
18 counsel for relator in a 2009 action that resulted in what was then the largest settlement ever paid
19 by a defense contractor in a whistleblower case, \$325 million, against Northrop Grumman for
20 selling defective components for government satellites. I was also lead counsel for relator in a
21 case against one of the largest dialysis companies in the country that concluded in 2014 for what
22 was then the largest stand-alone kickback settlement ever, \$400 million. In the past 18 months,
23 my firm has served as lead counsel in whistleblower cases that recovered \$360 million (my case),
24 \$140 million, \$57 million, and \$40 million.

25 4. In 2010, California Lawyer Magazine named me a "California Lawyer of the
26 Year." In 2008, the National Law Journal named me as one of the Top 10 "Winning" Attorneys
27 in the nation. I have been selected as one of the top 500 lawyers in America by Lawdragon and
28 one of the top lawyers in Northern California by Superlawyers from 2005 through 2020. I was

1 named to “Who’s Who in America” for 2014. I have taught fraud seminars at Stanford Law
2 School and Berkeley Law School. I am a former co-chair of the American Bar Association
3 Health Law Litigation Committee. Further information may be found at
4 <http://constantinecannon.com/blog/attorneys/eric-r-havian/>.

5 5. Constantine Cannon has approximately 75 attorneys in New York, Washington,
6 D.C., San Francisco and London. Although I lead the firm’s Whistleblower Representation
7 group, the firm’s practice is diverse and includes broad experience representing plaintiffs and
8 defendants in commercial litigation. Constantine Cannon was founded in 1994 as a boutique
9 antitrust firm, and it maintains a commitment to an antitrust practice today. Our attorneys are best
10 known for record-breaking accomplishments on behalf of plaintiffs. The firm nonetheless has
11 substantial experience representing defendants — from Fortune 500 companies to small, family
12 firms — in antitrust and commercial litigation.

13 6. While most of our work on behalf of plaintiffs and relators is undertaken on a
14 wholly or partially contingent basis, the firm’s overall practice includes cases where we bill our
15 clients each month on a non-contingent hourly basis. Our firm maintains standard billing rates for
16 each of the attorneys based upon his or her year of graduation from law school. These are the
17 rates the firm uses to bill fee-paying clients on a non-contingent hourly basis as well as subject
18 matter expertise. Every year, the firm devotes time and resources to reviewing those rates and
19 updating them consistent with the changes in the private marketplace, as well as the increased
20 skills and experience for each billing attorney. My current non-contingent rate is \$1,145 per hour.
21 Based upon the firm’s standard rates, as well as information I have gained from other attorneys
22 and related fees litigation, it is my opinion this rate is commensurate with the rates charged by
23 attorneys with my level of skills and experience at other firms in the Northern District of
24 California. These are the same rates we would seek to be awarded, and have been paid by settling
25 defendants, in statutory fee-shifting cases, including False Claims Act cases in this district and
26 elsewhere. In my experience with relators’ claims for attorneys’ fees in cases settled and
27 intervened by the government, defendants typically make a concerted effort to resolve attorneys’
28 fees claims as part of the main settlement or immediately thereafter.

1 7. In order to attract competent attorneys to important public interest cases under
2 fee-shifting statutes, it is essential that any fee award reflect the market value of the attorneys'
3 contingent representation. In our contingent antitrust and whistleblower representation cases, the
4 firm generally assumes the risk of not being compensated at all for the time and expenses
5 committed to the litigation. Moreover, even when we do prevail and become entitled to our fees
6 and costs, we anticipate that there will be substantial, indeterminate delays and expenses in the
7 process. Our firm is willing to undertake such cases only after a careful review of the case
8 circumstances, the likely amount of time and money that will be required to litigate the matter to
9 conclusion, and the projected recovery of attorneys' fees and costs. In general, our firm will
10 generally not accept contingent litigation unless the anticipated fee, if successful, is at a
11 substantial premium above the non-contingent hourly rates maintained by the firm for our hourly
12 fee-paying clients. In most cases involving lengthy and risky litigation, our projected fee needs to
13 be at least equal to 3 times the value of the firm's services billed at these non-contingent hourly
14 rates. If the projected fee does not meet this standard, we ordinarily would decline to accept the
15 responsibilities.

16 8. I am familiar with the experience, skills and reputation of Paul Scott and Lani
17 Remick, counsel for Mr. Franchek in this action. I have personally worked with Mr. Scott in
18 connection with briefings we provided to U.S. Senate staffers regarding proposed whistleblower
19 provisions in the Dodd-Frank Act, as well as presentations we jointly made to each of the
20 members of the Securities and Exchange Commission ("SEC") regarding their implementation of
21 the SEC's whistleblower program. I have also worked with Mr. Scott in a recent whistleblower
22 case that is being handled jointly by our firms. For numerous years, I have witnessed both Mr.
23 Scott and Ms. Remick's contributions to a broader nationwide community of attorneys who
24 practice under the False Claims Act through speaking at conferences and publishing papers in
25 connection with the same. I am aware that both of them formerly served as trial attorneys in the
26 Civil Fraud Section at the U.S. Department of Justice, which makes intervention decisions and
27 litigates on behalf of the United States in False Claims Act cases across the nation. I have also
28 reviewed drafts of both of their declarations in support of this fee petition. In my opinion, Mr.

1 Scott and Ms. Remick are both among the best whistleblower attorneys in the nation, with
2 extensive experience working under both the state and federal False Claims Acts. I routinely
3 choose to refer clients I am unable to represent to Mr. Scott's firm, among the very few attorneys
4 to whom I make such referrals. I do so because few other attorneys in the nation can match his
5 firm's expertise and legal skills.

6 9. False Claims Act litigation requires a unique level of skill and expertise for
7 relator's counsel to be most effective. The statutory framework and vast body of law interpreting
8 it is complex in the first instance. Added to that is the multi-party nature of the litigation, which
9 requires a strong familiarity with the manner in which state and federal governments conduct
10 their investigations, interact with defendants and make decisions on intervention in cases. All of
11 this knowledge must then be applied to the substantive claims in particular cases, each of which
12 can involve entirely different government programs with their own sets of governing statutes and
13 regulations, which are generally of threshold significance in determining whether false claims
14 were made to the government and what the damages are that flow from those claims. Though
15 there are an increasing number of attorneys taking on these cases, there are a limited number who
16 possess the experience and expertise in all aspects of these cases to litigate them most effectively.
17 Mr. Scott and Ms. Remick clearly fall within this category.

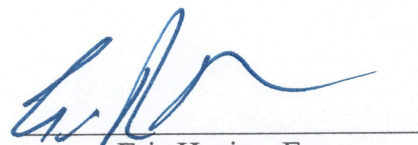
18 10. In False Claims Act cases, a critical element for whistleblower counsel is
19 formulating a very thorough and persuasive initial complaint, written disclosure and presentation
20 to the Government. These initial steps can often make a key difference in determining whether
21 the Government elects to allocate resources to the matter and pursue it with the defendants. This,
22 in turn, is important, for Government participation and commitment to intervention in a case is
23 almost always a strong positive factor in bringing the case to a favorable resolution. I am
24 familiar with the allegations and legal issues in this case. In this case, it appears that, due to the
25 strength of their original pleadings and presentation of evidence to the government, Mr. Scott and
26 Ms. Remick were successful in this regard and able to litigate this complex case with a high
27 degree of efficiency.
28

11. It is my understanding that Mr. Scott is seeking an award of attorneys' fees in this case using a 2021 hourly rate of \$919 and Ms. Remick is seeking an hourly rate of \$850. In my opinion, these rates are well within, if not below, the rates charged by attorneys in the private marketplace for similar work performed by attorneys with comparable skill, experience and reputation in the Northern District of California, including work representing whistleblowers in False Claims Act cases. I can confirm that they are below the rates billed by Constantine Cannon attorneys from our San Francisco office with similar years of practice and paid by fee-paying clients on a non-contingent basis and by defendants in settlements or as an award from courts under fee-shifting statutes for work of similar complexity in this district.

12. It is also my understanding that Mr. Scott and Ms. Remick are seeking a 10% lodestar enhancement to account for the risk of non-payment due to the settlement having been made with payments over time, contingent risk, the deterrent effect of the result on other GSA contractors, and the fact that defendants continue to have a GSA contract and have changed their practice on a going forward basis. As described above, it is my opinion that the private marketplace compensates attorneys willing to take cases on a contingent basis by paying a multiple of the standard fee-paying hourly rate. A modest multiplier of 1.1 is certainly reasonable and is minimally necessary to ensure that attorneys like Scott and Remick are willing to take on complex cases involving false claims against the government, particularly when plaintiffs would otherwise be unable to afford to pay for legal services on an hourly basis.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

DATED: 10/29, 2021


Eric Havian, Esq.